LIBRARY
SUPREME COURT, U. S.
FILED
FEB 13 19
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-757

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Petitioners,

v.

ROBERT F. SMITH, COMMISSIONER,
TENNESSEE DEPARTMENT OF TRANSPORTATION

AND

CLAUDE S. BRINEGAR, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondents.

PETITIONERS' REPLY BRIEF

JOHN W. VARDAMAN, JR.
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006

CHARLES F. NEWMAN
BURCH, PORTER & JOHNSON
130 North Court Avenue
Memphis, Tennessee 38103

Attorneys for Petitioners

February, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-757

CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL.,
Petitioners,

v.

ROBERT F. SMITH, COMMISSIONER,
TENNESSEE DEPARTMENT OF TRANSPORTATION

AND

CLAUDE S. BRINEGAR, SECRETARY,
UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondents.

PETITIONERS' REPLY BRIEF

---

1. The state respondent argues that petitioners are not entitled to legal fees under the "private attorney general" doctrine on the ground that their participation in the proceeding below was unnecessary since the Department of Justice, which also participated below, was on the same side as petitioners. The state's argument is a smoke screen designed to conceal what actually happened. Peti-

tioners' participation was necessary and appropriate not only because of their long standing interest as a party to this litigation, but also because there was grave doubt whether the Department of Justice would defend the 1973 decision of the Secretary of Transportation prohibiting construction of the highway through Overton Park.

At the first hearing on the state's petition, the United States Attorney inexplicably refused to defend the Secretary's decision.[1] Indeed, he sided with the state in suggesting a remand. Petitioners bore the entire burden of defending the Secretary's decision and the United States Attorney made clear his disagreement with petitioners.[2] Once the district

---

[1] The United States Attorney was the same counsel who had contended during the six week trial in 1971 that it was lawful for the highway to go through the park.

[2] After the United States Attorney indicated disagreement with petitioners' position, the following colloquy occurred:

> THE COURT: "Let me interrupt you a minute. You agree at this point that there is no way for the Court to review his [the Secretary's] decision that there is a feasible and prudent alternative until he says what it is, or they are, and, therefore, it would seem to me it would require a remand to him to say what it is or they are before I could review anything."
>
> MR. TURLEY [U.S. Attorney]: "Except that Your Honor in this sense is reviewing what he has done up to now by saying that it is indecisive. It isn't sufficient to put the matter in proper cast for the Court to further review, and that we ought to be able to get a definitive review in this litigation and the matter of a remand would produce that."
>
> THE COURT: "Right."
>
> MR. TURLEY: "But in ordering a remand Your Honor would be reviewing in a sense there."

[Footnote continued on page 3]

court granted the state's petition and vacated the Secretary's 1973 decision, the United States Attorney, rather than noting an appeal, "resigned" from the case and refused to play any further role in the litigation. Thus, it is ludicrous to suggest, as the state respondent does, that petitioners should have refrained from any action at that critical juncture of the litigation and left their interest in the hands of the Department of Justice. Instead, petitioners filed a notice of appeal in order to seek to reinstate the Secretary's 1973 decision. Subsequently, the Solicitor General authorized an appeal on behalf of the Secretary. The United States Attorney publicly criticized that decision in the local press and refused to file the notice.[3] It was necessary for the Department of Justice to dispatch an attorney from Washington to note the appeal. The United States Attorney's name is conspicuously absent from the notice of appeal and the briefs filed on behalf of the Secretary in the court of appeals.

---

[2] [Continued]

THE COURT: "All I would be doing is construing 4(f) and the Administrative Procedure Act and saying, put the two of them together, there is no way for me to review his determination that there is a feasible and prudent alternative unless he says what it is."

MR. TURLEY: "That's true."

(Tr. 16-17; Proceedings Before the United States District Court for the Western District of Tennessee, March 24, 1973)

Later the United States Attorney offered to expedite a remand by fixing the time limits for a new decision by the Secretary (Tr. 57-58).

[3] The Commercial Appeal, May 30, 1973 at 17; Memphis Press-Scimitar, May 30, 1973 at 18.

In the face of those events, petitioners were justified in believing that their participation was necessary to protect the 1973 decision of the Secretary. Indeed, in the court of appeals, counsel for petitioners was the only lawyer opposing the state respondent who had participated in the prior litigation, including the six week trial in the district court in 1971 and in commenting on the Environmental Impact Statement which ultimately ran 457 pages. In view of petitioners' counsel's greater familiarity with the factual background of the litigation, the Department of Justice agreed that petitioners' counsel should be the lead counsel at the oral argument in the court of appeals. Thus, in view of the foregoing, we believe it is a gross misrepresentation for the state respondent to characterize petitioners' role below as one of "amicus curiae" (Respondent Br. 4).

The state respondent's argument also overlooks the fact that since petitioners initiated the original litigation in 1969, and since the state's petition was filed under the caption of that litigation, petitioners were necessarily made parties below and required to participate, at least in the district court. When petitioners' actions in this litigation are viewed in light of the foregoing, as well as the result achieved below, we submit that they clearly come within the "private attorney general" rationale.

2. In our petition we pointed out that the Eleventh Amendment was inapplicable to the litigation which

produced the appeal below because it was not a suit "commenced or prosecuted against one of the United States . . . ." It was, instead, commenced by the state respondent. The state respondent argues that the initiation of litigation does not amount to a waiver of Eleventh Amendment immunity. The point, however, is not that the initiation of litigation constitutes a waiver of Eleventh Amendment immunity. The point is that the Eleventh Amendment applies only to suits "commenced or prosecuted *against* one of the United States" (emphasis supplied), not to litigation commenced or prosecuted *by* one of the states. Thus the question is not one of waiver, but rather of the applicability of the Eleventh Amendment in the first instance. Here it is clearly inapplicable.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for a Writ of Certiorari, it is respectfully submitted that certiorari should be granted.

Respectfully submitted,

JOHN W. VARDAMAN, JR.
WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006

CHARLES F. NEWMAN
BURCH, PORTER & JOHNSON
130 North Court Avenue
Memphis, Tennessee 38103

Attorneys for Petitioners

February, 1975